

**IN THE HIGH COURT OF JUSTICE**

**QUEEN'S BENCH DIVISION**

**ADMINISTRATIVE COURT**

**BETWEEN:**

**THE QUEEN**

**On the application of**

**WWF-UK AND CORNER HOUSE RESEARCH**

**Claimants**

**v**

**SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND  
REGULATORY REFORM**

**Defendant**

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**WITNESS STATEMENT OF NICHOLAS REGINALD HILDYARD**

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**I, Nicholas Reginald Hildyard, Director, of Corner House Research, Corner House, Station Road, Sturminster Newton, Dorset DT10 1YJ SAY AS FOLLOWS:**

**Introduction**

1. This witness statement is served on behalf of Corner House Research (“The Corner House”) in support of its claim for judicial review. Unless stated otherwise, the contents of this statement are within my own knowledge. Where I rely on sources other than my own personal knowledge, I have endeavoured to state the source and refer to the document. Rather than exhibiting numerous documents to this statement, references in square brackets are to the paginated judicial review bundle. I have also read the witness statement of James Leaton made on behalf of WWF-UK and I agree with it.

2. In this statement, I deal with the following issues:
  - (a) The Corner House's long-standing interest in monitoring and seeking to improve the Export Credits Guarantee Department (ECGD)'s environmental, human rights and development policies and their accompanying procedures;
  - (b) The Corner House's record of engagement with ECGD on the Sakhalin 2 project;
  - (c) The Corner House's concerns over the March 2004 decision by ECGD to grant conditional support for contracts detailed by the Sakhalin Energy Investment Company Ltd in respect of the Sakhalin 2 Project.

### **The Corner House's Interest in ECGD**

3. I am a director and policy analyst at The Corner House. The Corner House is a not-for-profit organisation, established in 1997, with a particular interest and expertise in the environmental, human rights and development impacts of infrastructure development and the role of the UK's Export Credits Guarantee Department in financing such development. The aims of the organisation include research, education and campaigning. The Corner House is a company limited by guarantee.
4. The Corner House's interest and involvement in the issue of ECGD support for overseas infrastructure development is long-standing. Since 1998, The Corner House has closely monitored the policies and operations of the ECGD, with a view to ensuring that the projects it backs meet international best practice and the UK's international environmental, human rights and anti-corruption obligations. To that end, it has given written and oral evidence to numerous policy and legislative bodies, including the Organisation for Economic Co-Operation and Development (OECD)'s Working Party on Export Credits and Credit Guarantees, which is responsible for developing

environmental and anti-corruption rules for OECD Export Credit Agencies<sup>1</sup>; the European Commission's Directorate on Trade; and the UK Parliament's International Development Committee, Environmental Audit Committee and Select Committee on Trade and Industry, all three of which have held inquiries into the ECGD's policies and procedures. The Corner House has also engaged directly through letters and meetings with the ECGD and other UK government departments. In addition, it has participated in regular field missions to assess the social and environmental impacts of a number of projects for which ECGD support was or is being sought, notably the Ilisu and Yusufeli dams and the Baku-Tbilisi-Ceyhan pipeline. It has also undertaken in-depth research into a number of ECGD-backed projects that have been tainted by allegation of bribery.

5. At the time that The Corner House first became engaged with the ECGD, the Department had no environmental or social policies and undertook no environmental assessment of the projects it supported. However, it has now adopted (at least on paper) many of the procedures and policies recommended by The Corner House and other non-governmental organisations.
6. In December 2000, after a public consultation in which The Corner House participated, the ECGD adopted a set of Business Principles which explicitly committed the Department to ensuring that its "activities take into account the government's international policies, including those on sustainable development, environment, human rights, good governance and trade" [ECGD, "ECGD's Business Principles, December 2000, p.1003].
7. In January 2001, under a pilot scheme, ECGD introduced Case Impact Analysis procedures, under which applicants for ECGD support were required to complete an Impact Questionnaire, detailing the potential environmental and social impacts of projects [ECGD, "Public Consultation on Case Impact Analysis", page 1011, paragraph 1, May 2002].

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1. Export Credit Agencies, of which ECGD is an example, are public agencies that typically provide export finance in the form of government-backed loans, guarantees, and insurance to private corporations from their home country to do business abroad.

8. In April 2003, following a public consultation by ECGD on its Case Impact Analysis process, on which The Corner House commented, new procedures were adopted, introducing a measure of greater transparency by committing ECGD to publish details of High Impact cases 60 days prior to a decision being made on support [ECGD, Press Release, “Revised Case Impact Analysis Process”, 1<sup>th</sup> (sic) April 2003, page 1033]
9. In October 2003, ECGD published a revised Case Impact Analysis Process, introducing a clear policy commitment that “projects should comply in all material respects with the relevant safeguard policies, directives and environmental guidelines of the World Bank Group” [ECGD, Case Impact Analysis Process, paragraph 2.6, October 2003, page 1035], a recommendation that The Corner House had been making since 1998.
10. The ECGD’s Impact Questionnaire was further revised in May 2004, following criticism from the Environmental Audit Committee that ECGD was prepared to finance projects involving child and forced labour, albeit “under exceptional circumstances” [Environmental Audit Committee, Export Credits Guarantee Department and Sustainable Development, 7<sup>th</sup> Report, paragraphs 47 and 48, 17 July 2007, pages 1054-1055]. The criticism was based on evidence supplied to the Committee by The Corner House.
11. The Corner House has also played an instrumental role in strengthening the ECGD’s anti-bribery procedures. In 2005, The Corner House successfully challenged the refusal of the Export Credit Guarantee Department to consult on a watering-down of its anti-corruption procedures, which took place at the request of major exporters, including BAE Systems Plc (*R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600, CA). The case was subsequently settled, with the ECGD agreeing to hold the consultation sought and paying The Corner House’s costs. Subsequently, the ECGD reinstated the majority of the rules that it had previously rescinded. In addition, in this case, The Corner House obtained the first full protective costs order made in a public law claim.

## **The Corner House's Engagement with ECGD over Sakhalin 2**

12. The Corner House's concerns over the environmental, social and developmental impacts of the Sakhalin 2 project are accurately summarised in Mr Leaton's Witness Statement and in our Grounds. I will not therefore burden the Court with further documentation. Instead, I will restrict myself to outlining The Corner House's long-standing engagement with ECGD on the Sakhalin project.
13. The Corner House first contacted ECGD over the Sakhalin 2 project in November 2002, when it requested a meeting in order that colleagues from Sakhalin Environment Watch, a Russian non-governmental organization ("NGO") which has been monitoring the project from its inception, might present their concerns to the ECGD. Colleagues from Pacific Environment, a US-based NGO with extensive monitoring experience of oil developments in the Russian Far East, would also have attended the meeting. In the event, ECGD regretted that it was unable to meet, due to previous commitments on the dates requested. A meeting did take place, however, in September 2003 or thereabouts, at which I also attended.
14. Subsequently, on 19<sup>th</sup> January 2004, The Corner House wrote to Mr Vivien Brown, then Chief Executive of ECGD, attaching a critique of the Environmental Assessment for the project, which The Corner House argued was unfit for purpose (pages 1056-1057). As detailed in our Grounds [paragraph 17], the ECGD responded with an assurance that ECGD support for the Project would only be made available "*if the relevant environmental, social and human rights impacts have been properly addressed*"; and that ECGD would only proceed "*if we are confident that the risks to the whales have been minimised*".
15. The Corner House has since continued to keep the Department informed of concerns raised by NGO colleagues, independent consultants and official agencies of the Russian Federation. From February 2004 to the present, ten such updates have been sent to the Department.

16. In April 2006, following publication of an amended Environmental Impact Assessment for Sakhalin, The Corner House took the lead in authoring a report assessing the Project against the ECGD's required policies and guidelines.

### **The March 2004 Decision**

17. I now turn to the ECGD's letter of 4 March 2004 (pages 100-103) to Sakhalin Energy Investment Company Ltd ("SEIC"), in which ECGD makes a binding commitment to support a list of UK contractors for the Sakhalin 2 project, subject to ECGD being satisfied as to the acceptability of unspecified measures being taken within an unspecified period "to identify and mitigate any adverse environmental and social impacts arising from the Project" [ECGD, Letter to Sakhalin Energy Investment Company Ltd, "Sakhalin II (Phase 2), 4<sup>th</sup> March 2004].

18. I affirm that I was unaware that such a legally-binding decision had been made until the ECGD's letter was released to Friends of the Earth on 13 June 2007 under the Freedom of Information Act (pages 271-272).

19. The failure of the ECGD to disclose the decision at the time it was made is of great concern to The Corner House, for the following reasons:

#### **a) Breach of Policy**

20. It was – and remains – ECGD's stated policy that preliminary indications on cover are non-binding. The ECGD has affirmed this policy *inter alia*: on its current web page entitled "Indication Procedures" [ECGD, "Indication Procedures", pages 1057a-1057c]; in its "Case Handling Process – Information Note", applicable from April 2003 onwards [ECGD, "Case Handling Process – Information Note", page 339-340]; and in a web page entitled "Products and Services", downloaded by The Corner House on 3<sup>rd</sup> March 2004, a day before the decision letter was written [ECGD, "Products and Services", accessed 3<sup>rd</sup> March 2004, pages 1058-1059].

21. By contrast here, a *binding* commitment to support the Project was given at the preliminary stage, prior to assessment of environmental impact issues and without any consultation with (or indeed any prior or subsequent notification to) stakeholders including The Corner House.

**b) Transparency: The Ilisu Dam**

22. In 1999, the Secretary of State for Trade and Industry issued a press statement announcing that he was “minded” to grant ECGD support for a controversial dam project – the Ilisu Dam in Turkey – subject to four specific conditions [DTI Press Release 'Byers Releases Reports on Ilisu Dam' 21 December 1999, pages 1060-1060a] The statement followed “careful consideration” by the Secretary of State of two reports on the environmental and social impacts of the project.

23. The way in which the Ilisu Dam project was dealt with is significant for three reasons. First, it was a “minded to” decision, which, in sharp contrast to the ECGD’s March 2004 letter, was non-binding. Second, it followed “careful consideration” by the Secretary of State of two reports on the environmental and social impacts of the project [DTI Press Release 'Byers Releases Reports on Ilisu Dam' 21 December 1999, pages 1060-1060a] – and thus did not separate the decision on support from the assessment of environmental impact related issues. Third, it was accompanied by four specific proposed conditions on which, because they were placed in the public domain, the public was able to comment and make representations – indeed, a fifth condition was subsequently added as a result of interventions from non-governmental organisations. For reasons set out in our Grounds [paragraph 10 (ii)], The Corner House believes that ECGD should have followed similar procedures in the case of Sakhalin, and that its failure to do so was unlawful.

**c) Sequencing and the Open-endedness of the Conditions**

24. The March 2004 decision is of additional concern to The Corner House because of the separation of environmental assessment from the legally-binding commitment to support the project. Environmental Impact Assessment is a pro-active tool, intended to identify the potential for damage *before* the

damage is done. The purpose of this is to avoid or reduce harm at source rather than merely making efforts to mitigate, or compensate for, damage once it is done. Retroactive identification defeats the purpose. If, for example, an adverse impact can only be “minimised” (the benchmark to which the ECGD has committed itself) by *not* undertaking a given construction, it follows that the ECGD’s commitment cannot be honoured once the construction has taken place. The palette of mitigation measures available to ECGD will also be progressively reduced as construction proceeds.

25. These concerns are dealt with in detail within the Grounds [*paragraphs 61-64*] and in Mr Leaton’s witness statement [*paragraphs 16 and 22*]. Here I would simply add that the ECGD’s decision to grant finance for Sakhalin before a satisfactory Environmental Impact Assessment was available, coupled with the ECGD’s open-ended approach to the conditions it attached to the decision – with no specific issues being identified and no time-frame for achieving compliance – reflects precisely the approach by ECGD that parliamentarians criticised in the case of the Ilisu Dam. As the International Development Committee put it at the time: “The unbiased observer must surely conclude that something has gone very wrong when conditionality is used in this way - with ECAs [Export Credit Agencies] and Governments bending over backwards to secure the deal . . . Is it always the case when such conditions are not met that ECGD simply asks for the required plans to be produced, and on that basis cover is given? How seriously can such commitments be taken? There is good reason for the expectation that relevant international criteria should be met before a proposal is agreed and cover sought – it is a sign of political will, institutional capacity, developmental commitment and good faith. The shotgun wedding approach to export credit that we find in the case of the Ilisu Dam does not in our view bode well for the implementation of commitments but is rather the worst form of export credit practice” [International Development Committee, “ECGD, Developmental Issue and the Ilisu Dam”, paragraph 11, Sixth report, August 2000, pages 1061-1066]

**d) Unjustified departures from policies**



26. ECGD has published policies requiring, among other things, that relevant environmental and social standards be met “in all material respects” [ECGD, Case Impact Analysis Process, paragraph 2.6, October 2003, page 317]. It has also stated that preliminary indications of support will not be binding: see paragraph 20 above. The public has a right to expect that ECGD will act in accordance with relevant published policies unless (a) there is a clear justification for acting otherwise and (b) ECGD has consulted relevant stakeholders on any proposal significantly to deviate from those policies or the principles underlying them. The Corner House has therefore been shocked by the apparent willingness of ECGD in this case to set aside policies wholesale when it suits its purposes, without any attempt to justify the derogations. The 2004 letter, with its abandonment of the principles that (i) preliminary notification without public consultation should be non-binding; (ii) environmental impact assessment should precede the taking of a binding decision by ECGD, is a particularly striking example.

### **Conclusion**

27. Had The Corner House been aware at the time of the March 2004 decision, it would have immediately sought an explanation as to why the ECGD was departing from its stated policies on preliminary notification. It would also have challenged the separation of the decision from the completion of the environmental impact assessment process, and ECGD’s failure to consult on its preliminary decision and on the conditions attached thereto. It has been prevented from doing so, until now, by the ECGD’s lack of transparency – but has proceeded with all possible expedition (allowing for the necessary pre-action correspondence and legal work) to mount such a challenge upon becoming aware (on 13 June 2007) of the March 2004 decision.

28. It is essential that that the ECGD proceeds on a correct legal footing. The Corner House is therefore strongly of the view that the lawfulness or otherwise of the March 2004 decision must be settled before the ECGD makes any final assessment as to whether or not the environmental conditions attached to its support have been fulfilled. In these circumstances, far from being premature, the current challenge is long overdue.

Statement of Truth

I believe that the facts set out in this statement are true.

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Nicholas Hildyard

Date: